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No. 98-387

In The

Supreme Court of the United States

October Term, 1998

GREATER NEW ORLEANS BROADCASTING ASSOCIATION, INC., individually and on behalf of its members; PHASE II BROADCASTING, INC.; RADIO VANDERBILT, INC.; KEYMARKET OF NEW ORLEANS, INC.; PROFESSIONAL BROADCASTING, INC.; WGNO, INC.; BURHAM BROADCASTING COMPANY, A Limited Partnership,

Petitioners,

v.

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE INSTITUTE FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Institute for Justice is a nonprofit, public interest law firm committed to defending the essential foundations of a free society and securing greater protection for individual liberty. Toward that end, the Institute seeks to reinvigorate the founding principles of the First Amendment by protecting the free flow of political and commercial information indispensable to our republican form of government and to our free enterprise economy. The instant case involves not only the level of constitutional protection afforded commercial speech, but is of fundamental importance to both a market economy and to consumers. The Institute's brief critiques the federal government's ban on casino advertising primarily from the perspective of the ultimate beneficiary of commercial information: the consumer.

STATEMENT OF THE CASE

Federal law currently prohibits radio and television stations from broadcasting advertisements for lawful casino gaming. 18 U.S.C. § 1304. Originally enacted in the Communications Act of 1934 as a comprehensive ban on

[1] In conformity with Supreme Court Rule 37, the Institute for Justice has obtained the consent of the parties to the filing of this brief, and letters of consent have been filed with the Clerk. The Institute also states that counsel for a party did not author this brief in whole or in part and that no persons or entities other than *amicus*, its members, and its counsel made a monetary contribution to the preparation and submission of the brief.

gaming advertisements, *see* ch. 552, § 316, 48 Stat. 1088, over the last 25 years, Congress has created numerous exceptions to this prohibition. Most notably, advertisements for Indian casinos[2] and wagers on sporting events[3] may legally air throughout the nation while state lottery promotions may be broadcast on stations located in those jurisdictions sponsoring lotteries.[4]

As the federal government has relaxed restrictions on gaming advertisements, so too have states moved in the direction of liberalized gaming laws. Today, some form of legalized gaming is allowed in 47 states, with private, non-Indian casinos legal in 11 states and Indian casinos now operating in 26 states.[5] As a result, three-fourths of Americans now live within 300 miles of a casino. *See* Mary Lynne Vellinga, "Questions Make Casino Operators Nervous," *Sacramento Bee*, Feb. 5, 1996, at A6.

Given the growth in the gaming industry, it is not surprising that broadcasters seeking to air casino advertisements along with private casinos themselves have challenged the constitutionality of federal advertising restrictions in three recent lawsuits. Courts in two of these cases have struck down the prohibition as violating

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[2] *See* 25 U.S.C. § 2701.

[3] *See* 18 U.S.C. § 1307(d).

[4] *See* 18 U.S.C. § 1307(a)(1), (2). Advertisements for fishing contests and charitable lotteries as well as occasional and ancillary commercial lotteries are also exempted from the ban. *See* 18 U.S.C. § 1305, *id.* at § 1307(a)(2)(A), (B).

[5] While entities often referred to as Indian casinos are located in 28 states, in two of these states, the "casinos" only offer bingo.

broadcasters' and casinos' free speech rights under the First Amendment. *See Valley Broadcasting Co. v. United States*, 107 F.3d 1328 (9th Cir. 1997); *Players International, Inc. v. United States*, 988 F. Supp. 497 (D.N.J. 1997).

In the instant case, however, both the United States District Court for the Eastern District of Louisiana and the United States Court of Appeals for the Fifth Circuit in a 2-1 vote have upheld the constitutionality of the advertising ban. *See Greater New Orleans Broadcasting Ass'n v. United States*, 69 F.3d 1296 (5th Cir. 1995); *Greater New Orleans Broadcasting Ass'n v. United States*, 866 F. Supp. 975 (E.D. La. 1994). When petitioners initially asked for a writ of *certiorari*, this Court remanded the case for reconsideration in light of its decision in *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996), where the Court unanimously invalidated Rhode Island's ban on the price advertising of liquor and strengthened the scrutiny applied to commercial speech restrictions. On remand, however, the Fifth Circuit once again rejected petitioners' challenge by a 2-1 vote. *See Greater New Orleans Broadcasting Ass'n v. United States*, 149 F.3d 334 (5th Cir. 1998). The question on which this Court has now granted *certiorari* is whether "the federal government may, consistent with the First Amendment, undertake to suppress lawful casino gaming by banning truthful non-misleading broadcast advertising for such gaming."

SUMMARY OF ARGUMENT

This Court should no longer recognize an artificial distinction between "commercial" and "noncommercial" speech. Under the First Amendment, "commercial" and "noncommercial" speech should be granted equal protection, and all regulations restricting the dissemination of truthful commercial information should be subject to strict scrutiny review. As the facts of this case demonstrate, consumers not only have a "keen" interest "in the free flow of commercial information," *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976), but such advertising can also provide knowledge highly relevant to pressing political disputes.

The federal government may not, consistent with the First Amendment, paternalistically deny consumers truthful information about lawful casino gaming for fear they may use it unwisely. As Justice Stevens recognized in *44 Liquormart*, "The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." 517 U.S. at 503.

Rather than protecting consumers from the harms of gaming, this advertising ban, like other commercial speech restrictions, hurts consumers. Advertising plays a vital role in the efficient operation of our free enterprise economy. When it is restricted, consumers are less able to make informed economic decisions, have fewer choices in the marketplace, and encounter higher prices.

Advertising restrictions are often motivated by economic protectionism; competition both between products in the same market and between different product groups

is distorted when the government selectively curtails free speech rights. It is thus crucial that this Court require a tight fit between the ends and means of commercial speech restrictions, or illegitimately motivated restrictions will survive constitutional challenge.

Whether this Court explicitly analyzes the federal law under the rubric of strict scrutiny or instead applies the *Central Hudson* test, the ban on private casino advertising fails to pass constitutional muster.

ARGUMENT

I. TRUTHFUL COMMERCIAL SPEECH SHOULD BE GRANTED THE SAME PROTECTION UNDER THE FIRST AMENDMENT AS OTHER FORMS OF SPEECH AND EXPRESSION

In *Virginia State Board of Pharmacy*, this Court eliminated any doubt as to whether commercial speech is protected by the First Amendment. Invalidating a Virginia statute prohibiting licensed pharmacists from advertising prescription drug prices, the Court noted that the "free flow of commercial information is indispensable" to the functioning of our free enterprise economy, 425 U.S. at 765, and observed that "a consumer's interest in the free flow of commercial information" may be greater "than his interest in the day's most urgent political debate." *Id.* at 763.

Four years later, in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557 (1980), the Court held that a New York regulation banning promotional advertising by electric utilities ran afoul of the

First Amendment. In *Central Hudson*, however, the Court distinguished "commercial" speech from "noncommercial" speech, defining the former as "expression related solely to the economic interests of the speaker and its audience," *id.* at 561, or "speech proposing a commercial transaction." *Id.* at 562. It then said that "the Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *Id.* at 562-63.

A four-part test was formulated for reviewing the constitutionality of commercial speech restrictions:

> For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest.

Id. at 566. The Court has since applied the *Central Hudson* test in analyzing a variety of commercial speech restrictions, striking down some while upholding others. *See, e.g., Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (invalidating regulation prohibiting beer labels from displaying alcohol content); *Edenfield v. Fane*, 507 U.S. 761 (1993) (striking down regulation banning in-person solicitation by certified public accountants); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) (invalidating ordinance prohibiting distribution of commercial handbills); *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328 (1986) (upholding law restricting advertisements of casinos in Puerto Rico).

This Court's rigid segregation of commercial speech jurisprudence from the rest of First Amendment doctrine, however, was called into question by its recent decision in *44 Liquormart*. The Court produced four separate opinions in unanimously striking down a Rhode Island statute prohibiting the price advertising of liquor. Rhode Island had justified the ban as a bid to promote temperance among its citizens.

Justice Thomas, writing for himself, argued that the Court should no longer apply the *Central Hudson* test in those cases where the government seeks to restrict truthful information for the purpose of keeping consumers in the dark and thus "manipulating their choices in the marketplace." *Id.*, 517 U.S. at 518. And Justice Stevens, in a portion of his opinion joined by Justice Kennedy and Justice Ginsburg, rejected the proposition that "all commercial speech regulations are subject to a similar form of constitutional review simply because they target a similar category of expression." *Id.* at 501. Justice Stevens reasoned that prohibitions of truthful, non-misleading advertising rarely protect consumers from the " 'commercial harms' that provide[ ] 'the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech.' " *Id.* at 502 (*quoting Discovery Network*, 507 U.S. at 426). Although not explicitly calling for strict scrutiny review of bans on the dissemination of truthful, non-misleading commercial information, Justice Stevens cast considerable doubt as to whether such restrictions should be subjected to less than

"the rigorous review the First Amendment generally demands." *Id.* at 501.[6]

A. The distinction between commercial and noncommercial speech is unprincipled and untenable.

As both Justice Thomas and Justice Stevens have suggested, it is time for this Court to abandon its artificial and rigid distinction between "commercial" and "noncommercial" speech. Regardless of the standard used to review misleading or coercive speech, a strict scrutiny analysis should be adopted for restrictions on the publication or broadcast of truthful commercial information.

The artificiality of the demarcation separating commercial speech from noncommercial speech is illustrated by the facts of the instant case. Under the federal statute at issue here, a news report may inform television viewers of the various gaming opportunities offered at a particular casino (e.g., craps, blackjack, or roulette), but a commercial advertisement containing exactly the same information may not air. Even though the content of the speech may be identical, the news report, it is argued, is "noncommercial" speech and thus entitled to a higher level of constitutional protection than the advertisement, which is stuck with the Scarlet Label of "commercial" speech.

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[6] Justice Scalia also expressed "discomfort with the *Central Hudson* test" in his separate concurring opinion. *44 Liquormart*, 517 U.S. at 516.

But if the information conveyed is the same, what justifies the disparate treatment? The chief difference is that in one example, information is contained in an advertisement, which has the chief purpose of encouraging a specific economic transaction, while in the other example, the information is communicated as part of a broadcast which has the principal intent of enlightening or entertaining a general audience. But as Justice Stevens has observed, "economic motivation or impact alone cannot make speech less deserving of constitutional protection, or else all authors or artists who sell their works would be correspondingly disadvantaged." *Rubin*, 514 U.S. at 491 (Stevens, J., concurring). Moreover, with the exception of public television and radio, news broadcasts must lure an audience so that advertisers will buy commercial spots. The content of these programs is therefore designed to attract audience interest so that viewers can be exposed to commercial messages. So while the route is more indirect, radio and television news also has as one of its purposes the promotion of certain economic transactions.

This Court has offered two rationales for subordinating the protection of "commercial" speech: first, its accuracy is more easily verifiable than other forms of expression; and second, it is less likely to be chilled due to the power of the profit motive. *See Central Hudson*, 447 U.S. at 564 n.6; *Virginia Pharmacy*, 425 U.S. at 771 n.24. These unfounded assertions, however, do not support diminished constitutional protection for the dissemination of truthful commercial information.

Commercial information is no more "objective" or "verifiable" than much of the news published in the

morning paper. The price of a McDonald's hamburger, for example, is as easily ascertainable as the score of a Detroit Tigers baseball game or the results of congressional elections. In any event, it is unclear why less scrutiny should be applied to efforts to suppress "objective" or "verifiable" information. If anything, the conclusion is counterintuitive. One would think that the dissemination of truthful information, commercial or noncommercial, would be entitled to the highest level of constitutional protection.

Similarly, it is by no means clear that commercial speech is hardier or less easily chilled than other forms of expression. An author's passion to write, for instance, may be far greater than his motivation to advertise his work. And an animal-rights or anti-abortion activist may be far less dissuaded by restrictive speech regulation than an entrepreneur. Even, however, if the Court's theory regarding the power of the profit motive, as a predictive matter, has merit, its reasoning seems irrelevant to the question of what standard should be used to scrutinize attempts to suppress truthful commercial information. The government should not be granted more leeway in restricting the free flow of information simply because certain information may be difficult to suppress.

Both Justice Stevens and Justice Thomas recognized in *44 Liquormart* that the Court's stated rationales for distinguishing "commercial" from "noncommercial" speech fail to justify reviewing bans on the dissemination of truthful, non-misleading speech with a lower level of scrutiny than that normally applied under the First Amendment. *See 44 Liquormart*, 517 U.S. at 502 (Stevens, J., principal opinion) ("neither the 'greater objectivity'

nor the 'greater hardiness' of truthful, non-misleading commercial speech justifies reviewing its complete suppression with added deference."); *id.* at 523 n.5 (Thomas, J., concurring) ("neither of these rationales provides any basis for permitting government to keep citizens ignorant as a means of manipulating their choices in the marketplace."). Absent any coherent rationale for distinguishing truthful "commercial" speech from truthful "noncommercial" speech, this Court should review the federal government's attempt to prohibit the broadcast of casino gaming advertisements with strict scrutiny.

B. Commercial speech is critically important to informed public debate on important political issues.

The robust exchange of commercial information is vital to the health of our free market economy. As Justice Blackmun noted, "[s]o long as we preserve a predominantly free enterprise economy, the allocation of resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of information is indispensable." *Virginia Pharmacy*, 425 U.S. at 747.

But Justice Blackmun not only recognized the economic value of commercial speech, he also understood its importance to public policy debates. *See id.* In *Virginia Pharmacy*, Justice Stewart similarly explained that information about drug prices could impact "a person's views

concerning price control issues, government subsidy proposals, or special health care, consumer protection, or tax legislation." *Id.* at 780 n.8.

This case, perhaps better than any commercial speech case ever to come before this Court, demonstrates the crucial link between commercial speech and political discourse. The question of whether casinos and other forms of gaming should be legalized is one of the burning issues of our time.[7] Residents of numerous states have recently seen the issue debated in either their state's legislature or in a referendum campaign.[8]

The federal government's ban on private casino advertising, however, hampers discussion of this important political issue. *See 44 Liquormart*, 514 U.S. at 503 ("commercial speech bans . . . impede debate over central issues of public policy."). It is a matter of common sense that truthful information about casinos would be helpful to Americans evaluating whether casino gaming should be legal.[9] The more knowledge a voter has about any

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[7] *See* Jill Lawrence, "Politicians Roll the Dice on Gambling," *USA Today*, July 20, 1998, at 8A.

[8] *See, e.g.*, Tom Buckman, "Gamble Pays Off in Ontario; Buffalo Weighs Its Entrance into the Gaming Arena," *The Buffalo News*, Jan. 31, 1999, at 12 (referring to New York State Legislature's rejection of attempts to legalize casino gaming); Rick Alm, "The Battle Over Boats in Moats," *The Kansas City Star*, Oct. 18, 1998, at A1 (analyzing Missouri referendum campaign); Zachary Coile, "Indian Casinos: Big Money Battle," *San Francisco Examiner*, Aug. 2, 1998, at A1 (describing California referendum fight).

[9] *See United States v. Edge*, 509 U.S. 418, 438 n.2 (Stevens, J., dissenting) ("advertising relating to the Virginia lottery may be of interest to those in North Carolina who are currently debating whether that State should join the ranks of the growing number of States that sponsor a lottery.").

issue, the better able he or she is to reach an informed judgment. Any attempt to suppress the distribution of information about casino gaming when it takes the form of "commercial" speech impoverishes the political debate, eliminating one important avenue for citizens to discover facts relevant to a pressing political dispute.[10] The importance of commercial information to the casino gaming debate elucidates the folly of strictly segregating "commercial" from "noncommercial" speech and provides another reason why the federal government's ban should be reviewed under strict scrutiny.

II. THE FEDERAL GOVERNMENT'S CASINO ADVERTISING BAN IS DETRIMENTAL TO THE INTERESTS OF CONSUMERS

Although petitioners represent broadcasting outlets seeking to air casino advertisements, this case is of profound importance to those who are the ultimate beneficiaries of commercial information: consumers. This Court has long recognized both the legal right of consumers to receive advertising, *see Virginia Pharmacy*, 425 U.S. at 757

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[10] It is not entirely clear, however, which side of the political debate would be aided by casino advertisements. Although promotional advertising might cause voters to be more favorably disposed towards casinos, it is also possible that greater awareness of the presence of casinos could sour popular support for their continued operation. There are certain activities, after all, the public will tolerate only so long as they remain hidden.

("if there is a right to advertise, there is a reciprocal right to receive the advertising"), and the value of advertising in allowing consumers to make intelligent and well-informed decisions. *See id.* at 765. Here, however, the government paternalistically asserts that consumers will be better off if they remain ignorant.

The federal government argues that its prohibition of private casino advertisements directly and materially advances its interest in reducing the prevalence of compulsive gambling. The Fifth Circuit, however, noted that the government's position "suffers fatally . . . because none of its sources specifically connect casino gaming with broadcast advertising for casinos." *Greater New Orleans Broadcasting Ass'n*, 149 F.3d at 339. Notwithstanding the government's failure to offer evidence supporting the efficacy of the advertising restrictions, however, the panel majority cited many of its own sources on the nature of compulsive gambling to justify upholding the ban.

While many of these articles and studies detail the alleged evils caused by compulsive gambling, only an op-ed by William Safire draws any link whatsoever between advertising and compulsive gambling.[11] And Safire's column merely reports that "many psychiatrists" *suggest* a link between gambling addiction and casino advertising currently allowed under the law; the columnist himself admits that the theory has yet to be proven. *See* William

[11] While Safire asserts that advertising may lead to compulsive gambling, he is referring to advertising currently allowed under the law, such as billboards and newspaper advertisements, rather than broadcast advertisements.

Safire, "A Gambling Lesson: There's Now a Sucker Born Every Second," *Dallas Morning News*, June 6, 1998, at 11A.

With all due respect to Mr. Safire, the Fifth Circuit's analysis flies in the face of this Court's admonition that "speculation or conjecture" cannot be used to show that a commercial speech restriction directly advances the government's asserted interest in suppressing speech under the third prong of the *Central Hudson* test. *Edenfield v. Fane*, 507 U.S. 761, 770 (1993). The unsupported assertions of unnamed "psychiatrists" regarding the effect of those casino advertisements which are now legal do not even come close to proving that current casino advertising restrictions alleviate the harms of compulsive gambling "to a material degree," *Edenfield*, 507 U.S. at 771, but rather more resemble the paucity of empirical support offered by the State of Rhode Island to justify its ban on the price advertising of liquor in *44 Liquormart*. The federal government's casino advertising ban should therefore meet the same fate as the Rhode Island statute.

Every year, millions of Americans legally choose to gamble in casinos, and it is these consumers who are most harmed by the federal government's advertising restrictions. Advertising restraints, by their very nature, are anti-competitive. The ability to advertise is vital to new entrants into a market, whether it be casinos or some other sector of the economy. New businesses must advertise to create awareness of their products among consumers. Commercial speech restrictions therefore work to the advantage of established businesses and to the disadvantage of their potential rivals.

Before the ban on the television advertising of cigarettes was imposed in 1970, for example, approximately one new brand of cigarettes was successfully launched each year. But during the first four years of the prohibition, no new product was able to successfully enter the market. *See* Ekeland, Jr. & Saurman, *Advertising and the Market Process: A Modern Economic View* 94 (1988). The moral of the story is clear: "advertising functions as a tool of entry, making markets more, not less, competitive." *Id.* at 95. When advertising is restricted, consumers are provided with fewer choices in the marketplace, and entrepreneurs are hindered in attempting to start new businesses.[12]

The pro-competitive effect of advertising also reduces prices for consumers.[13] By providing a path for

[12] By freezing competitors out of the marketplace, commercial speech restrictions can be quite counterproductive. Cigarette advertising on television, for example, was prohibited in order to improve public health. But "the ban on TV cigarette advertising unquestionably slowed the introduction of low-tar and low-nicotine cigarettes." Ekelund, Jr. & Saurman at 137.

[13] By transferring price information to consumers, advertising plays a vital role in the operation of the price system, which is an integral component of our free market economy. In his seminal essay, *The Use of Knowledge in Society*, Friedrich Hayek recognized that the price system is the central organizing mechanism of a market economy. He explained, "It is more than a metaphor to describe the price system as a kind of machinery for registering change, or a system of telecommunications which enables individual producers to watch merely the movement of a few pointers, as an engineer might watch the hands of a few dials, in order to adjust activities to changes of which they may never know more than is reflected in the price movement. . . . Through [the price system] not only a division of labor but also a coordinated utilization of resources based on an equally divided knowledge has become possible." Hayek, *The Use of Knowledge in Society*, 35 Am. Econ. Rev. 519 (1945), *reprinted in The Essence of Hayek* 211, 219-21 (Nishiyama & Leube eds. 1984).

competitors to gain a foothold in a market, advertising reduces the likelihood that any company either will gain market power and thus have the ability to increase prices or will seek to exploit any market power they are able to acquire by raising prices. Price advertising also decreases the search costs for consumers seeking the lowest price for a certain good or service. The ability of consumers to use commercial information to compare the prices offered by different companies thus limits the amount that businesses are able to charge. *See id.* at 123. One study, for example, found that billboard advertising at gas stations reduced gas prices by five to eight percent. *See* Kelly and Maurizi, *Prices and Consumer Information: The Benefits from Posting Retail Gasoline Prices* 35 (1978).

Commercial speech restrictions therefore have the net effect of raising prices. One study compared the prices of eyeglasses in the 1960s in those states that banned the advertising of eyeglasses and eye examination prices with those that did not. The author concluded that advertising prohibitions increased prices in the eyeglasses market to a statistically significant degree, with price increases ranging from ten to 25 percent. *See* Lee Benham, *The Effect of Advertising on the Price of Eyeglasses*, 15 J. of Law and Econ. 337-52 (1973). A study sponsored by the Federal Trade Commission in the 1980s similarly discovered that advertising restrictions in the market for legal

services led to markedly higher prices. William Jacobs et al., *Improving Consumer Access to Legal Services: The Case for Removing Truthful Restrictions on Commercial Advertising, Report of the Staff of the Federal Trade Commission* (1985). Prices were higher in those states that significantly restricted lawyer advertising than those states with relatively liberal advertising rules. *See id.*

In the casino gaming context, price is measured in terms of expected payout: the amount of one's money that a person can expect to win back on average at a particular game. For example, a slot machine's expected payout might be 90 percent of money wagered, so the effective price of gaming is 10 percent of one's wager. Las Vegas casinos, among others, currently advertise expected payouts on billboards seeking to entice customers with the promise of higher payouts, or in other words, lower prices. Perversely, the federal government's ban on the broadcast of casino advertisements frustrates this price competition and therefore increases gamblers' losses.

Besides providing consumers with more choices and reduced prices, advertising also enhances the quality of goods and services offered in the marketplace. As stated before, advertising reduces consumers' search costs; it not only lowers consumers' costs of locating a less expensive product but also of finding a higher quality product. By lowering consumers' search costs, advertising makes it easier for a consumer to switch products if he becomes dissatisfied. *See* Ekeland, Jr. & Saurman at 120. This places pressure on companies to offer high-quality goods and services or else run the risk of losing business. *See id.*

An FTC study on the quality of eyecare services provides empirical support for this conclusion. Many states restrict, either by statute or licensing regulations, the ability of optometrists to advertise their services. The FTC discovered, however, that the quality of hard contact lens fitting service was higher among those optometrists that advertised than those that did not. *See* Hailey, et al., *A Comparative Analysis of Cosmetic Contact Lens Fitting by Ophthalmologists, Optometrists, and Opticians, Report of the Staff of the Federal Trade Commission* (1983).

The federal government claims that its ban on casino advertising is designed to protect Americans from the harms of compulsive gambling. But it provides no evidence establishing that consumers are better off when denied truthful, non-misleading information about casinos. Instead, American consumers are the ultimate losers under the casino advertising ban. They are left in a market position "of less information, reduced choice and a strong likelihood of higher prices." Ekelund Jr. & Saurman at 150.

III. THIS COURT SHOULD REQUIRE A TIGHT FIT BETWEEN THE MEANS AND ENDS OF COMMERCIAL SPEECH RESTRICTIONS, A FIT NOT PRESENT IN THE FEDERAL GOVERNMENT'S CASINO ADVERTISING BAN

The federal government's scheme for regulating the broadcast of gaming advertisements is quite odd. The government justifies its ban on the broadcast of private casino advertisements with its need to combat the harms

caused by compulsive gambling and its desire to protect the interests of those states where private casinos are illegal. Yet, federal law currently permits advertisements for Indian casinos and sports wagering to be aired in all 50 states.

These are far from *de minimis* exceptions to the ban. Indian casinos, for example, currently operate in 26 states, and in 1996, more money was wagered in Indian casinos than in all Atlantic City casinos combined. *See Staff Report of National Gambling Impact Study Commission: Native American Gaming* (1998). Indian casinos generally offer the same games as most private casinos: craps, roulette, blackjack, etc. The federal government has not argued (and indeed could not successfully argue) that wagering in Indian casinos is less likely to lead to gambling addiction than wagering in private casinos. Yet, the government allows the broadcast of Indian casino advertisements while at the same time curtailing the free speech rights of private casino operators.

The exceptions to the ban also make a mockery of the government's asserted interest in protecting the interests of those states where casino gaming is illegal. Setting aside the question of whether it is even permissible to keep the citizens of one state in the dark about activities that are legal in another state,[14] an anti-casino state has

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[14] *Compare Bigelow v. Virginia*, 421 U.S. 809 (1975) (striking down restrictions on abortion advertising by out-of-state providers), *with United States v. Edge*, 509 U.S. 418 (1993) (upholding constitutionality of federal statute restricting broadcast of lottery advertisements to stations located in those states sponsoring lotteries).

the same interest in "protecting" its citizens from Indian casinos as it does in "protecting" its citizens from private casinos. Yet, under the statute the government asks this Court to uphold, only advertisements for Indian casinos are legal.

The Court signaled in *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), that the government could not selectively restrict commercial speech in a manner casting doubt on its claimed motivation for doing so. In *Coors*, the Court unanimously struck down a federal regulation prohibiting beer labels from displaying alcohol content. The government asserted that its regulation was motivated by its interest in preventing "strength wars" from breaking out between rival beer brands. Yet, the government allowed alcohol content to be disclosed in beer advertising in most of the country and indeed required labels of wines with more than 14 percent alcohol to display alcohol content.

The Court noted the overall regulatory scheme made little sense if the government's true interest was in suppressing strength wars among alcoholic beverages and held that the specific regulation involving beer labels therefore failed to directly and materially advance the government's stated interest in restricting speech. *Id.* at 488. Following this Court's lead, the Ninth Circuit in *Valley Broadcasting v. United States*, 107 F.3d 1328 (9th Cir. 1997), cited the exceptions to the casino advertising ban in striking down the federal statute at issue here. The Ninth Circuit held that the ban on the broadcast of private casino advertisements could not directly and materially advance either of the government's asserted interests in restricting speech so long as the government

continued to permit the broadcast of numerous gaming advertisements, including those for Indian casinos. *Id.* at 1334-36.

The Fifth Circuit, however, rejected the Ninth Circuit's view, observing that the federal government's decision to allow the broadcast of Indian casino and sports wagering advertisements while prohibiting the broadcast of private casino advertisements was a "quintessentially legislative choice[ ]." *Greater New Orleans Broadcasting Ass'n*, 69 F.3d at 1301. The panel majority's analysis, however, is fundamentally in error as this Court has made it clear that commercial speech restrictions are to be reviewed under heightened scrutiny rather than rational basis review. Therefore, the scope of such restrictions must not be a "quintessentially legislative choice."

This Court has firmly established that commercial speech restrictions must be "narrowly tailored" to advancing the government's asserted interests. *See 44 Liquormart*, 517 U.S. at 529 (O'Connor, J., concurring) (*quoting Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)). Restrictions that are overly broad, prohibiting more speech than necessary to accomplish the government's stated purpose, chill constitutionally protected expression and call into question the government's true motives in suppressing speech. Cf. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (purpose of requiring fit between means and ends of racial classifications is to "smoke out" illegitimate motives).

This Court, however, has also guarded against speech restrictions which selectively curtail expression with little apparent rhyme or reason. In *City of Cincinnati v. Discovery Network*, for example, the Court struck down an

ordinance restricting the distribution of commercial handbills, while at the same time allowing the distribution of noncommercial handbills. Although the City claimed that the ordinance was necessary for aesthetic purposes, it could not explain how newsracks for noncommercial handbills were more aesthetically pleasing than those containing commercial handbills. Similarly, in *Carey v. Brown*, 447 U.S. 455, 465 (1980), this Court invalidated a statute prohibiting union picketing in residential neighborhoods while permitting other types of picketing in such neighborhoods. Although the State of Illinois had urged that its statute advanced its interest in protecting residential privacy, the Court observed that "nothing in the content-based labor-nonlabor distinction has any bearing whatsoever on privacy." *Id.* at 465. *See also R.A.V. v. St. Paul*, 505 U.S. 377 (1992) (government may not limit scope of ban on unprotected fighting words or obscenity to those which express a point of view with which the government disagrees).

The Court has tacitly recognized what it should now make explicit: a tight fit is required between the ends and means of restrictions on the dissemination of truthful commercial information for such restrictions to survive scrutiny under the First Amendment. Although the Court has previously explained the required fit to be a "reasonable" one, *see Fox*, 492 U.S. at 480, a majority of this Court in *44 Liquormart* expressed support for a more rigorous standard. Justice Stevens wrote for four Justices in applying "a more stringent review" than the "reasonable fit" standard, *44 Liquormart*, 517 U.S. at 507, and Justice Thomas called for normal First Amendment scrutiny to be applied in such cases. The importance of requiring a

tight fit between the means and ends of commercial speech restrictions is especially critical as such restrictions are often of an economically protectionist nature, seeking to advance the interests of certain producers at the expense of their competitors and consumers.

It is not uncommon for seemingly benevolent legislation to be rooted in attempts by some private parties to gain personal advantage through the political process at the expense of others. Public choice economists have labeled such behavior "rent-seeking." Buchanan, Tollison & Tullock, *Toward a Theory of a Rent-Seeking Society* (1981) (containing definitive treatment of rent-seeking and its origins and effects upon a democratic society).

In *44 Liquormart*, for example, Rhode Island's ban on the price advertising of liquor was supported by smaller liquor stores seeking to prevent price competition and to protect its position in the market from larger retailers with larger advertising budgets. Enlisting the government to curtail a rival's right to advertise is an extremely effective way of gaining a competitive advantage in the marketplace, but it is an illegitimate use of the state's power. This Court must therefore require a tight fit between the means and ends of commercial speech restrictions to ensure that the coercive power of the state is not hijacked for illegitimate purposes.

In the instant case, the federal government's casino advertising ban cannot pass constitutional muster under either a "tight fit" or a "reasonable fit" standard. The government cannot show how the distinction between private casinos and Indian casinos has any relevance to

its asserted interests in the reduction of compulsive gambling and the protection of the interests of anti-casino states. Accordingly, the federal statute is inconsistent with the First Amendment and may not stand.

CONCLUSION

As Justice Blackmun recognized in his *Central Hudson* concurring opinion, "the suppression of information concerning the availability and price" of legal goods and services "strikes at the heart of the First Amendment." *Central Hudson*, 447 U.S. at 556. Because the federal government's casino ban restricts the dissemination of truthful commercial information, it should be reviewed under strict scrutiny. The ban is premised on the notion that Americans will be better off if left ignorant and thus runs directly counter to the First Amendment and our nation's glorious tradition of free speech and open inquiry.

For the foregoing reasons, *amicus curiae* Institute for Justice respectfully requests that this honorable Court reverse the opinion below.

Respectfully submitted,

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